(5)

No. 04-1034

IN THE

Supreme Court of the United States

JOHN A. RAPANOS, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION, LAURENCE A. PETERSON, AND EDMOND C. PACKEE, JR., AS *AMICI CURIAE* SUPPORTING PETITIONERS

DANIEL J. POPEO
PAUL D. KAMENAR
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave., NW
Washington, D.C. 20036
(202) 588-0302

MARK A. PERRY
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., NW
Washington, D.C. 20036
(202) 955-8500

Counsel for Amici Curiae

April 4, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION ADDRESSED BY *AMICI CURIAE*

The climactic escape scene in the recent movie *Finding Nemo* is premised on the notion that "all drains lead to the ocean." Did the court of appeals err in applying this same premise to conclude that the federal government has the statutory and constitutional authority to regulate every drain in America that shares some "hydrological connection" with a navigable waterway?

TABLE OF CONTENTS

Page

QUESTION ADDRESSED BY *AMICI CURIAE* i
INTEREST OF *AMICI CURIAE* 1
REASONS FOR GRANTING THE PETITION 2
CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

CASES

Ex parte Boyer, 109 U.S. 629 (1884) 8

Economy Light and Power Co. v. United States, 256 U.S. 113 (1921) 5

Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988) 6

GDF Realty Inv., Ltd. v. *Norton*, 326 F.3d 622 (5th Cir. 2003), *petition for cert. filed* (U.S. May 27, 2004) (No. 03-1619) 1, 9

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) 5

Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001) 1, 9

McDermott Int'l, Inc. v. Wilander, 498 U.S. 337 (1991) 5

Nat'l Ass'n of Home Builders v. *Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998) 1

Rancho Viejo, LLC v. *Norton*, 323 F.3d 1062 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1218 (2004) 1, 9

Solid Waste Agency of N. Cook County v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001) 1, 4, 5, 6, 8, 9-10

The Daniel Ball, 77 U.S. (10 Wall.) 557 (1871) 5

United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940) 5

United States v. Lopez, 514 U.S. 549 (1995) 8

United States v. Morrison, 529 U.S. 598 (2000) 8

United States v. Rapanos, 339 F.3d 447 (6th Cir. 2003) 2

United States v. Rapanos, 190 F. Supp. 2d 1011 (E.D. Mich. 2002) 3

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 4

United States v. Rueth Dev. Co., 189 F. Supp. 2d 874 (N.D. Ind. 2001) 7

STATUTES

33 U.S.C. § 1251 2

33 U.S.C. § 1251(b) 8

33 U.S.C. § 1311(a) 4

33 U.S.C. § 1344(a) 4, 5

BRIEF FOR THE WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION, LAURENCE A. PETERSON, AND EDMOND C. PACKEE, JR., AS *AMICI CURIAE* SUPPORTING PETITIONERS

Amici curiae Washington Legal Foundation (WLF), Allied Educational Foundation (AEF), Laurence A. Peterson, and Edmond C. Packee, Jr., respectfully submit that the petition for a writ of certiorari should be granted.[1]

INTEREST OF *AMICI CURIAE*

WLF is a nonprofit public interest law and policy center based in Washington, D.C., with thousands of supporters nationwide. WLF engages in litigation and the administrative process in a wide variety of areas, including cases involving property rights and the scope of the federal government's Commerce Clause powers. In particular, WLF has participated as *amicus curiae* in several recent cases that raise constitutional issues similar to those asserted by the parties in this case. *See, e.g., GDF Realty Inv., Ltd.* v. *Norton*, 326 F.3d 622 (5th Cir. 2003), *petition for cert. filed* (U.S. May 27, 2004) (No. 03-1619); *Rancho Viejo, LLC* v. *Norton*, 323 F.3d 1062 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1218 (2004); *Solid Waste Agency of N. Cook County* v. *United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001); *Nat'l Ass'n of Home Builders* v. *Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998).

---

[1] Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. Letters consenting to the filing of this brief have been submitted to the Clerk.

AEF is a nonprofit charitable and educational foundation based in New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including law and public policy. AEF has appeared as *amicus curiae* in many cases in which WLF has been involved, including many of those cited in the previous paragraph.

Laurence A. Peterson is the Operations Manager for Travis/Peterson Environmental Consulting, Inc. ("TPECI"), an Alaskan wetlands consulting company. He earned a Master of Science degree in Environmental Health Science from the University of Alaska Fairbanks, completed the U.S. Army Corps of Engineers wetland delineation course, and has identified, evaluated, and permitted wetlands in Alaska for twenty years. Edmond C. Packee, Jr., a professionally registered soil scientist and certified professional in erosion and sediment control, and Senior Scientist at TPECI, also earned a Master of Science degree from the University of Alaska Fairbanks in Mine Reclamation Science, and has identified, evaluated, permitted, and reconstructed wetlands in Alaska for thirteen years. Packee and Peterson have a combined thirty-three years of first-hand experience with the Corps' haphazard and contradictory methods of determining wetlands jurisdiction.

REASONS FOR GRANTING THE PETITION

The court of appeals held that even though petitioners' privately owned lands are *twenty miles away* from navigable rivers, they are *still* within the ever-expanding jurisdiction of the Army Corps of Engineers under the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*, because they share a so-called "hydrological connection" with the distant rivers. *See* Pet. App. A14. This supposed "connection" between one parcel of property and a distant navigable river is thrice removed: "The wetlands are connected to the Labozinski Drain (a one hundred year-old man-made drain) which flows into Hoppler Creek which, in turn, flows into the Kawkawlin

River, which is navigable." *United States v. Rapanos*, 339 F.3d 447, 449 (6th Cir. 2003).

Strangely enough, the "wetlands" in question are actually dry because, in the early 1900s, the county drain commission dug drains in order to make the land suitable for farming. *See Wetlands Desperado*, Editorial, WALL ST. J., Aug. 23, 2004, at A12. Imagine John Rapanos's surprise when, decades after he bought the land, the federal government insisted that the very drains that kept the property dry magically transformed his farmland into protected "wetlands." Even more fantastically, the government declared that those same man-made drains were "navigable waters" that somehow affected interstate commerce, and therefore, Rapanos's nearby land was subject to federal jurisdiction. Because Rapanos challenged this ridiculous assertion, the government has pursued criminal and civil actions against him for over ten years. In the criminal action, Rapanos has endured a mistrial, a conviction, a grant of a new trial, a denial of the new trial with a remand for sentencing, a sentencing hearing, a remand for harsher resentencing, a vacation of the resentencing by this Court, a vacation of his conviction, a reinstatement of his conviction, and, finally, a sentencing order identical to his original sentence, which has already been served. *See* Pet. App. A4-5.

The government also has relentlessly pursued the civil action. Though the district court implausibly found that Rapanos's lands were "adjacent to waters of the United States," *see* Pet. App. B34, the court of appeals, to its credit, did not make that bold misstatement. Instead, it decided it was simply too difficult to determine whether rivers twenty miles away were "adjacent," and therefore abandoned the adjacency test altogether. *See* Pet. App. A8; *United States v. Rapanos*, 190 F. Supp. 2d 1011, 1012 (E.D. Mich. 2002) (stating that the Kawkawlin River is twenty miles distant). In its place, it created the new "hydrological connection" test, stating that a "significant nexus between the wetlands and navigable waters . . . can be satisfied by the presence of a hydro-

logical connection." *See* Pet. App. A16 (citation omitted). By creating this unfounded and vague rule, the court of appeals not only ignored this Court's requirement that wetlands must actually be adjacent to navigable waters to be subject to the CWA, but also obliterated any possible meaning of the term "navigable" in the statute. At the same time, the court of appeals impermissibly expanded the reach of Congress' Commerce Clause power, conceivably allowing it to envelop any molecule of water that may one day reach a river, which would grant Congress jurisdiction over all water in the United States.

1. By its terms, the Clean Water Act does not apply to every drip and drop of water in the Nation. The section at issue only makes unlawful unauthorized discharges "of dredged or fill material into the *navigable waters*." 33 U.S.C. § § 1311(a), 1344(a) (emphasis added). In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), this Court recognized that "the transition from water to solid ground is not necessarily or even typically an abrupt one," and made the reasonable decision that the definition of navigable waters also included wetlands that "actually abut[] on a navigable waterway." *Id.* at 132, 135.

Although there was initially a question after *Riverside* of whether Congress intended to apply the CWA to remote or non-adjacent wetlands, this Court definitively answered that question in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001) ("*SWANCC*"), stating that "our holding [in *Riverside*] was based in large measure upon Congress' unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the CWA to cover wetlands *adjacent to navigable waters*." *Id.* at 167 (emphasis added). Yet the court of appeals completely ignored *SWANCC*, concluding that "[t]here is no 'direct abutment' requirement in order to invoke CWA jurisdiction." *See* Pet. App. A21. This conclusion was necessary

because no conceivable definition of "adjacent" could bring petitioners' property within the Corps' jurisdiction.[2]

But the court of appeals did not stop with simply scrapping this Court's requirement of adjacency. It then proceeded to destroy any reasonable interpretation or definition of the word "navigable" as used in the CWA. After quoting less than one sentence from the legislative history of the CWA, the court breezily concluded, "Congress clearly envisioned that CWA jurisdiction would extend to bodies of water exhibiting a hydrological connection to traditional navigable waters." *See* Pet. App. A17. But, as this Court stated in *SWANCC*, "such a ruling would assume that 'the use of the word navigable in the statute . . . does not have any independent significance.'" 531 U.S. at 172 (citation omitted).

Again, the CWA prohibits unauthorized discharges "into the navigable waters." 33 U.S.C. § 1344(a). In this Court's long history of jurisprudence concerning the Nation's waterways, the term of art "navigable" has had but one meaning: whether the waters in question can be traversed or be reasonably made traversable by boat. *See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824); *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871); *Economy Light and Power Co. v. United States*, 256 U.S. 113, 122-23 (1921); *United States v.*

---

[2] Indeed, the Corps itself is not quite sure what properties it may regulate under the CWA. Different Corps District Offices use different rules for how close a wetland must be from navigable water before it can be regulated. For instance, under the rules of the Jacksonville District or the Philadelphia District, this case would not be before the Court: those districts do not regulate wetlands more than 200 feet and 500 feet, respectively, from waters of the United States. UNITED STATES GENERAL ACCOUNTING OFFICE, WATERS AND WETLANDS: CORPS OF ENGINEERS NEEDS TO EVALUATE ITS DISTRICT OFFICE PRACTICES IN DETERMINING JURISDICTION 19 (Feb. 2004). Such amorphous and shifting regulatory "standards" make it impossible for landowners, developers, regulators, and other concerned citizens to accurately predict the outcome of the permitting process. *Amici* Peterson and Packee have experienced these problems first-hand in their consulting business.

Appalachian Elec. Power Co., 311 U.S. 377, 407-09 (1940). "[W]hen a statute uses such a term, Congress intended it to have its established meaning." *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991). Just four years ago, this Court recognized that the holding of *Riverside* stretched the definition of "navigable" slightly, but explained it did not wish to "read[] the term 'navigable waters' out of the statute." *SWANCC*, 531 U.S. at 172. Although the Court had "said in *Riverside Bayview Homes* that the word 'navigable' in the statute was of 'limited effect,'" the *SWANCC* Court explained that "*it is one thing to give a word limited effect and quite another to give it no effect whatever.*" *Ibid.* (emphasis added). Therefore, the Court concluded "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Ibid.* What this Court did *not* find in *SWANCC*, unlike the court below, was *any* indication that Congress intended to use a "hydrological connection" test to determine either navigability or jurisdiction.

By allowing something with a "hydrological connection" to a navigable water to magically become "navigable" itself, the court of appeals has completely disregarded this Court's ruling in *SWANCC* and removed all meaning from the term "navigable." A water's navigability does not depend upon its ultimate destination; the only consideration is whether someone can drive a boat on it. The water in a puddle on a sidewalk will eventually find its way to a river, but the puddle is surely not "navigable"—and Congress certainly cannot assert its Commerce Clause power over the child who fills the puddle with dirt to make mud pies. Indeed, removing the true meaning of "navigable" from the CWA raises "serious constitutional problems." *SWANCC*, 531 U.S. at 173 (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). Despite this Court's ruling in *SWANCC* just four years ago, lower

courts refuse to recognize the plain meaning of "navigable," which has created confusion about the constitutional reach of the CWA. Therefore, there is a great need for this Court to accept the petition for certiorari and to instruct the lower courts to "read the statute as written." *SWANCC*, 531 U.S. at 174.

2. The federal government lacks the constitutional power to regulate every drip and drop of water in the Nation that might eventually find its way to a navigable waterway. Yet that is precisely what the court below allowed the Corps to regulate. Its reasoning proceeds as follows: water trickles from petitioners' land into a hole in the ground, the drain. The water in the drain eventually reaches a creek. The creek eventually reaches a navigable river. The distance to the river—twenty miles—is irrelevant; all that matters is that the water eventually reaches the river.[3]

The glaring problem with this logic is that it has no stopping point. Even if the property were 100 miles away, it could still be "connected" to the river via drains, brooks, creeks, and streams, or even groundwater, and therefore would still be subject to the claws of the federal government. Taking the logic even further, the water that drains out of every sink, toilet, shower, and bathtub in the Nation eventually reaches a body of navigable water, and therefore Congress can regulate private citizens' kitchens and bathrooms. If this argument seems like hyperbole, consider that a court

---

[3] This leads to the logical, but absurd, conclusion that to evade jurisdiction, Rapanos should prevent any water from his land from ever reaching the Kawkawlin River—by filling the drains. The Galveston District of the Corps of Engineers actually recognizes this practice: "Officials at the Galveston District said a result of this policy is that a nonjurisdictional ditch [a manmade ditch with no high water mark that is not itself a wetland] can be filled without a section 404 permit, severing the jurisdictional connection of the wetland to the water of the United States. After the connection is severed, the previously jurisdictional wetland is rendered nonjurisdictional and can be filled without a section 404 permit." *See* WATERS AND WETLANDS, *supra*, at 23-24.

has held that the federal government has jurisdiction over private land if even *a single raindrop or molecule of water* from the land "ultimately" mixes with a navigable river. *See United States v. Rueth Dev. Co.*, 189 F. Supp. 2d 874, 877-78 (N.D. Ind. 2001), *vacated in part by* 189 F. Supp 2d 874 (2002), *aff'd*, 335 F.3d 598 (7th Cir. 2003).

This is nothing less than the assertion of a federal police power over all water in the United States, something the Constitution explicitly prohibits: "The Constitution . . . withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation. *See* Art. I, § 8." *United States v. Lopez*, 514 U.S. 549, 566 (1995). "With its careful enumeration of federal powers and explicit statement that all powers not granted to the Federal Government are reserved, the Constitution cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate." *United States v. Morrison*, 529 U.S. 598, 618 n.8 (2000). This is especially true in the context of land and water regulation, as the Congress and this Court both have recognized that the "traditional and primary power over land and water use" resides with the States: "Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources . . . .'" *SWANCC*, 531 U.S. at 174 (quoting 33 U.S.C. § 1251(b)). Because this Court "*always* ha[s] rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power," the attempted creation of a police power over the Nation's waters must be stopped immediately. *Morrison*, 529 U.S. at 618-19 (quoting *Lopez*, 514 U.S. at 584-85 (Thomas, J., concurring)).

Indeed, the federal government would need a general police power to regulate petitioners' land, because the land certainly has nothing to do with the government's power to regulate interstate commerce. The drains and creeks near the property do not support watercraft used to transport goods or provide services, and therefore definitely are not channels of

interstate commerce or part of the "highway for commerce between ports and places in different States." *Ex parte Boyer*, 109 U.S. 629, 632 (1884). Neither do the drains and creeks substantially affect interstate commerce, even though the Corps argues that commerce is affected because the property's pollutants—or, more accurately, sand—may mix eventually with a body of navigable water.

Neither the Corps nor the court of appeals have put forth *any* argument that a grain of sand that travels from petitioners' land to a river twenty miles distant has a measurable effect on the economic activities of one or more States.[4] Congress has not determined that all forms of water pollution have economic effects, and therefore did not base the jurisdiction of 33 U.S.C. § 1344(a) on the economic effects of pollution—it based the jurisdiction on navigability. Therefore, the argument that a non-navigable waterway may become tainted with sand is not a sufficient basis for invoking Congress's Commerce Clause power.

The decision below flies in the face of this Court's decision in *SWANCC*. The issue in *SWANCC* was whether Congress had regulatory power over an abandoned gravel pit filled with water. As the pond was an isolated body of water, did not carry boats shuttling people or cargo to and fro across state lines, and therefore had absolutely no direct connection to interstate commerce, the Corps went over the top in its at-

---

[4] If there were any possible argument that the flow of water to a distant river was an economic activity, the Corps would assert it. In the past the Corps has argued that interstate commerce is significantly affected by the presence or movement of wild animals such as migratory birds, *SWANCC*, 531 U.S. at 159, arroyo toads, *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003), red wolves, *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000), or small, subterranean invertebrates, *GDF Realty Inv., Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003), *petition for cert. filed* (U.S. May 27, 2004) (No. 03-1619), but in this case, no potentially commercial fish or wildlife is at issue—only water. If the Court were to grant the petition in *GDF Realty*, the petition in this case should also be granted or, at a minimum, held for disposition of that case on the merits.

tempt to regulate the pond--literally. As it could not allege a commercial connection to the pond via waterway, the Corps took to the sky and claimed that because there were commercial activities associated with migratory birds and those birds landed on the pond in question, the pond, therefore, affected interstate commerce. This Court flatly rejected that argument, finding that there was "no persuasive evidence" that Congress ever acquiesced to "the Corps' claim of jurisdiction over nonnavigable, isolated, intrastate waters." *SWANCC*, 531 U.S. at 171. Therefore, the Court "decline[d] respondents' invitation to . . . hold[] that isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under § 404(a)'s definition of 'navigable waters' because they serve as habitat for migratory birds." *Id.* at 171-72. This Court made clear that isolated ponds are not subject to the CWA, and off-limits from Congress' attempts at jurisdiction.

Yet though the Corps' aerobatics failed in *SWANCC*, it now wants to bore below the surface in a transparent attempt to regulate the identical waters by another means. As some of the pond's water mixes with neighboring groundwater, which mixes with a creek, which mixes with a stream, which eventually flows into a river used to carry cargo between states, the Corps tries to reassert jurisdiction via this dubious connection to interstate commerce. But to do so would render this Court's decision in *SWANCC* meaningless. The pond in question is the same—it has absolutely no role in interstate commerce. If the Corps could not reach the pond from above, this Court should grant the petition for a writ of certiorari to prevent the Corps from grasping it from below.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

MARK A. PERRY
Counsel of Record
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

DANIEL J. POPEO
PAUL D. KAMENAR
WASHINGTON LEGAL
FOUNDATION
2009 Mass. Avenue, N.W.
Washington, D.C. 20036
(202) 588-0302

Counsel for Amici Curiae

April 4, 2005

Counsel wish to acknowledge Michael D. Billok, a student at Georgetown University Law Center, for his assistance in the preparation of this brief.